ordinances in effect on May 19, 1997, and still in effect today[5]. Rather, it asks that the City be ordered to process Chibardun's permit applications promptly pursuant to its existing requirements and procedures, and that the City be preempted from delaying or denying grant of the permits on the basis of additional requirements that are not included in, or consistent with, these existing requirements and procedures.

Sections 253(a) and 253(d) expressly grant the Commission jurisdiction to preempt local government actions that prohibit entry by prospective competitors into telecommunications markets. This authority is not negated or circumscribed merely because the local government cloaks its prohibition in the language of "right-of-way management."

Here, the City has never claimed that Chibardun's May 19, 1997 excavation permit applications were incomplete, defective or otherwise unqualified for grant. Nonetheless, the City immediately departed from its established practice of "same day" grant, and

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[5] The City's Interim Ordinance No. 849 (Exhibit J) did not change the substantive excavation permit requirements of Rice Lake Code Sections 6-2-3 and 6-2-4. Rather, the Interim Ordinance required excavation permits only for construction projects with a "value of $50,000 or more" (Section 2), and exempted entirely "repair and maintenance work associated with existing equipment and facilities" (Section 3). Whereas these provisions significantly favor incumbent utilities by exempting virtually all of their projects other than major system rebuilds, they do not change any of the fee, insurance or indemnification provisions of Rice Lake Code Sections 6-2-3 and 6-2-4 for those projects that still require excavation permits. The Interim Ordinance contains no mention of "License Agreements" or "Permit Agreements," and refers to changes in existing obligations and restrictions only as "subjects for consideration" with respect to a future comprehensive ordinance.

held the applications for consideration "in due course." The City first informed Chibardun that it would delay action until it could develop a "future telecommunications ordinance" -- an ordinance which the City Administrator has admitted was contemplated only because Chibardun wanted to come to Rice Lake. The City then requested extensive "further information" regarding extraneous service, operating territory, rate, WPSC certification and interconnection matters having no relationship to rights-of-way. Finally, the City presented Chibardun with a "License Agreement" containing obligations and restrictions that far exceeded the permit requirements in Rice Lake Code Sections 6-2-3 and 6-2-4, and that constituted a prohibitive barrier to Chibardun's entry into Rice Lake.

To the extent that the "License Agreement" provisions can be deemed to touch upon "right-of-way management" (rather than serving solely as entry barriers), they are not protected by the "safe harbor" of Section 253(c) of the Act unless they are "competitively neutral and nondiscriminatory," and unless any compensation required is "fair and reasonable." 47 U.S.C. § 253(c). Here, the City has sought to impose the License Agreement's onerous provisions upon the new entrant Chibardun, while leaving the incumbent GTE and other local utilities regulated by the far less restrictive and expensive requirements of its existing ordinances. The larger fees and insurance requirements in the "License Agreement," not to mention the unlimited reimbursement obligations and indemnifications liabilities, render it impossible for a new

entrant like Chibardun to compete with an incumbent monopoly like GTE. Moreover, as GTE itself has recognized, these increased expenses and unlimited liabilities far exceed any realistic interpretation of "fair and reasonable" compensation. In sum, the City's proposed "License Agreement" does not qualify for the Section 253(c) "safe harbor." Therefore, the Commission has full jurisdiction under Sections 253(a) and 253(d) of the Act to preempt the City's denial of entry to Chibardun.

B. Chibardun Has Standing As A Party In Interest

Chibardun agrees that "standing" requires a legally protected interest that is concrete and particularized, and that has been injured by the challenged action.

Chibardun has a legally protected interest under Section 253(a) of the Act not to be prohibited by the City from providing telecommunications services in Rice Lake. Chibardun has filed adequate and complete applications under the City's existing ordinances for the excavation permits necessary to construct the facilities over which it will provide its proposed services. However, the City has refused to grant Chibardun's excavation permits in accordance with its existing requirements and procedures, and has therefore directly prohibited Chibardun from providing its proposed services.

The City's allegations that Chibardun has withdrawn its permit applications are erroneous. Chibardun has never notified the Street Department or the City that it was withdrawing its applications, nor has it ever been notified by the Street Department or

the City that the applications have been denied, rejected or dismissed. Neither the applications nor the fee check have ever been returned to Chibardun by the Street Department or the City.

Chibardun's rejection of the City's "License Agreement" on June 9, 1997, did not constitute a withdrawal of its permit applications. Chibardun had no obligation to accept, or to negotiate, additional obligations and restrictions that far exceeded the requirements set forth in the City's existing ordinances. Rather, it was entitled to demand that its permit applications be processed and granted in accordance with the City's existing requirements and procedures.

C. Chibardun's Petition Should Not Be Dismissed As Premature

GTE asserts that Chibardun's petition should be dismissed as premature because: (a) the onset of the northern Wisconsin winter has precluded its ability to move forward with construction until the Spring of 1998; and (b) the City intends to adopt a permanent right-of-way ordinance early in 1999 (GTE Comments, pp. 6-8). GTE asks the Commission to dismiss Chibardun's petition, "with leave to refile so that Chibardun may challenge the permanent ordinance once it is adopted."

The primary effect of GTE's proposal would be to preserve its Rice Lake local exchange monopoly from Chibardun's competition until at least late 1999. As detailed previously, the short northern Wisconsin construction season (May 1 to November 15) makes

it essential for Chibardun to finalize its equipment and contractor arrangements before the annual construction season begins, and to commence construction as soon as possible after the ground thaws if it is going to be able to commence operation of its proposed Rice Lake telecommunications system during a given year. The City's refusal to grant excavation permits in June, 1997 precluded Chibardun from commencing service until late 1998. If the Commission permits the City to further delay matters beyond the commencement of the 1998 construction season, another year will be lost and service commencement will be pushed back to at least late 1999.

At the time the City adopted its initial Interim Ordinance (Exhibit J) in August 26, 1998, it specified that its duration would be four months or until it adopted its permanent right-of-way ordinance, whichever came first (Section 4). However, on December 29, 1997, the City adopted Ordinance No. 849-1 (Exhibit K), extending its Interim Ordinance an additional four months. In other words, it now appears that the City does not expect to finalize its "future" ordinance until at least late April or early May of 1998 -- that is, after arrangements need to be wholly or virtually completed if construction is to be undertaken during the 1998 season.

Chibardun should have been granted its excavation permits and allowed to enter the Rice Lake market during 1997. It has already been delayed until at least late 1998, and should not be further delayed for another year or more by a dismissal that will only

serve to perpetuate GTE's monopoly.

II. THE CITY'S REFUSAL TO GRANT CHIBARDUN'S PERMITS CONSTITUTES A CLEAR AND DIRECT PROHIBITION OF ITS ABILITY TO PROVIDE TELECOMMUNICATIONS SERVICES IN RICE LAKE

The City's refusal to grant Chibardun's excavation permits is the sole and direct cause of Chibardun's inability to provide telecommunications services in the Rice Lake market.

A. Chibardun Has Met Its Burden Of Proof Under Section 253(a) Of The Act

Chibardun has demonstrated that the City has violated Section 253(a) of the Act. In brief, Chibardun has shown: (1) that it needs excavation permits to construct its proposed Rice Lake telecommunications system; (b) that it has filed applications with the City that comply with the City's existing ordinances, and that are otherwise complete and qualified for grant under the procedures employed by the City during 1997 to process the applications of numerous other entities; and (c) that the City has refused to grant Chibardun's permit applicants unless and until it accepts onerous obligations and responsibilities that are not required by existing City ordinances. The City's unlawful refusal to grant Chibardun's permits has thus clearly and directly prohibited Chibardun from providing telecommunications services in Rice Lake.

Rice Lake Code Section 6-2-3(a) requires any entity making any opening or excavation in any public street, alley, way, ground or sidewalk, or in any City owned easement, to have a permit. Chibardun has proposed to construct a new underground telecommunications

facility to serve Rice Lake. As the operator of telephone systems in seven nearby northwestern Wisconsin communities, Chibardun has determined that buried cable is far superior to aerial wires for safety, reliability, maintenance and aesthetic purposes. Consequently, before it can commence construction of any part of its proposed Rice Lake system, Chibardun needs to obtain excavation permits from the City.

On May 19, 1997, Chibardun filed applications with the Rice Lake Street Department for six excavation permits (Exhibit A). These applications complied fully with Rice Lake Code Sections 6-2-3 and 6-2-4, and included all requested information and engineering drawings. Under the City's established application procedures, Chibardun's permits should have been granted on the same or next day (Exhibit D).

However, notwithstanding Chibardun's compliance with its existing ordinances and application requirements, the City refused to grant the requisite permits. It first indicated that it would delay action on the applications until it could draft and adopt the "future comprehensive ordinance" which the City Administrator has admitted is aimed at Chibardun. The City then requested extraneous rate, service, certification and interconnection data having no relevance to its now alleged right-of-way concerns. Finally, the City refused to grant the permits unless and until Chibardun entered into a "License Agreement" containing harsh and unfavorable terms that Chibardun could not possibly accept.

The City's requirement that Chibardun enter into the proposed

"License Agreement" was unlawful and unreasonable because: (1) the document imposed obligations and restrictions far exceeding the requirements in existing Rice Lake ordinances; (2) these additional obligations and restrictions were to be imposed upon the new entrant Chibardun, but not upon the existing monopoly GTE; and (3) the additional obligations and restrictions are so harsh and expensive that they would preclude Chibardun from competing viably in the market, especially against an entrenched monopoly like GTE.

It is a cardinal principle of administrative law that governments and their agencies are bound by their own rules as long as they are in force, and that they may depart from their existing rules only by amending them. U.S. v. Nixon, 418 U.S. 683, 695-96 (1974); Service v. Dulles, 354 U.S. 363, 388 (1957). From the May 19, 1997 filing date of Chibardun's permit applications to the present, Rice Lake Code Sections 6-2-3 and 6-2-4 have clearly and specifically set forth the fees, insurance coverage, indemnification requirements and other provisions governing the City's grant and oversight of excavation permits. As long as its existing ordinances specify only a $10.00 fee for excavation permits, the City may not lawfully demand, impose, negotiate or otherwise require certain applicants to pay a $1,000 administrative fee, or to reimburse the City for "any and all" of its review, inspection or supervisory costs. As long as its existing ordinances establish specific minimum insurance coverage requirements for excavation permittees, the City may not lawfully demand, impose, negotiate or otherwise require certain permittees to obtain substantially

greater or and expanded insurance coverage. As long as its existing ordinances establish indemnification requirements that are limited in scope and time, the City may not lawfully demand, impose, negotiate or otherwise require certain permittees to indemnify it against liability for injuries "arising in any way" from the operation, maintenance or use (as well as the construction or removal) of its facilities, including claims resulting from the negligence of City employees and agents and from exposure to electromagnetic fields.

Contrary to the League's assertions (League Comments, p. 5), Chibardun is not saying that a municipality may never modify its ordinances in response to changing circumstances. Rather, Chibardun asks only that the City and other municipalities apply the requirements of their existing ordinances to all applicants and permittees. If an ordinance becomes outmoded, the municipality can change it -- but it must apply the existing ordinance to all entities while it remains in effect, and then apply the new ordinance to all entities once it goes into effect. What the City must be prevented from doing is applying the requirements of its existing ordinances to GTE and other incumbent utilities, while demanding that Chibardun and other potential new entrants agree to more stringent requirements not contained in the City's existing ordinance.

Notwithstanding that GTE has sought and obtained at least two excavation permits while Chibardun's applications have been pending, the City has not attempted to impose any of the additional

requirements in its "License Agreement" upon GTE. As a large and well-established incumbent, GTE does not need to be given any more competitive advantages in Rice Lake than it already possesses.

Finally, the obligations and restrictions in the "License Agreement" are so harsh and expensive that Chibardun could not possibly agree to them and survive as a viable competitor in Rice Lake. For example, the City's proposed indemnification requirement encompasses such a broad range of individuals (including City employees and agents, even when negligent), post-construction activities (including operation and usage), and potential claims (including electromagnetic exposure) that Chibardun would be wholly unable to limit or control the amount, scope or duration of its potential liability. With such a indeterminate and uncontrollable liability on its balance sheet, Chibardun would not be able to obtain a loan from any lender presently known to it. Likewise, the advance one-year and three-year construction plans and schedules required to be submitted by Chibardun would tell GTE well in advance exactly how Chibardun planned to develop its system, and give GTE plenty of time to implement counter moves to neutralize or defeat these plans. Again, in addition to the $10,000-versus-$10 fee disparity, Chibardun would be required to bear the substantial and uncontrollable additional cost of reimbursing the City for "any and all" costs which the City might incur to review, inspect or supervise Chibardun's activities. These financial and planning/intelligence disadvantages would destroy Chibardun's capability to offer viable competition to GTE in Rice Lake.

In sum, Chibardun has met its burden of proving that the City has prohibited its ability to provide telecommunications services in Rice Lake. Like the municipality in Classic Telephone, Inc., 11 FCC Rcd 13082 (1996), the City has denied a potential entrant the local authorization needed to enter a local market, even though the prospective competitor has satisfied all of the existing qualifications and requirements for grant of such authorization. This violation of Section 253(a) requires preemption, and the Commission should order the City to grant Chibardun's pending applications promptly under its existing ordinances and procedures, so that Chibardun can construct and commence operation of its proposed Rice Lake system during 1998.

B. Chibardun Was Entitled To Prompt Grant Of Its Excavation Permits

As demonstrated in Exhibit D, virtually all of the ninety-eight (98) excavation permit applications processed by the City's Street Department during the first ten months of 1997 were granted on the **very same day** they were submitted. Moreover, the vast majority of these applications were granted in ministerial or "rubber stamped" fashion with little or no review by Street Department employees.

The City's assertion that significant review of excavation permit applications was necessary to minimize right-of-way disruption (City Opp., pp. 35-6) is belied by its failure to employ such review in its processing of the 98 applications it granted during the period bracketing the submission of Chibardun's

applications.

The City also claims that it could not simply grant Chibardun's permit applications without first addressing "increased use of the rights-of-way by additional, and potentially multiple new providers" (City Opp., p. 38). Yet, as demonstrated in Exhibit D, the City has been dealing with multiple permittees and users before and after Chibardun filed its application. During the first ten months of 1997, the City granted excavation permits to **nineteen** different entities, including GTE; Wisconsin Gas Company; Rice Lake Water Utility;, Rice Lake Electric Utility; Del's Excavating & Trucking; B&D Services; H&E, Inc.; L&L Excavating; STAAB; Kirckof Plumbing; Antczak Construction; Big Bike Parts; Certified Inc.; Mancl R&M Excavating; Meyers Electric; Leroy Zingler; Alan Klasi; F. Daniel Mani; and Earthmovers Inc.

Finally, the City alleges that it "knew practically nothing about [Chibardun] -- including such things as what services would be provided and whether Chibardun had obtained the requisite certification from the [WPSC] so that it could provide telecommunications services within Rice Lake and within the state" (City Opp., p.p. 40-1). It claims not to know whether Chibardun "would actually be capable of making use of the rights-of-way space it was seeking to excavate" (Id.). However, Chibardun is neither a new start-up company nor a newcomer to the Rice Lake area. Rather, it is a local northwestern Wisconsin company that has long provided local exchange service to six (and now seven) communities within a 3-to-22 mile radius of Rice Lake. Chibardun's service record and

operations are well-known by Mr. Hanson and the many other Rice Lake residents that have asked it to provide service in Rice Lake. They were, and remain, readily ascertainable by any City official willing to make a phone call or two to the governments, media or Chambers of Commerce within these nearby communities.

In sum, Chibardun had every right to expect that its excavation permit applications would be processed and granted according to the same expeditious Street Department procedures applied to the 98 applications of the other 19 entities that sought such permits during the first ten months of 1997.

III. THE CITY'S PROHIBITION OF CHIBARDUN'S ENTRY IS NOT PROTECTED BY SECTION 253(c)'S SAFE HARBOR

As the City notes, Section 253(c) provides a "safe harbor" for local governments to manage public rights-of-way and to require fair and reasonable compensation from telecommunications providers -- if they do so "on a competitively neutral and nondiscriminatory basis."

Section 253(c) is intended to permit "state and local legal requirements that: (1) regulate the time or location of excavation to preserve effective traffic flow, prevent hazardous road conditions, or minimize notice impacts; (2) require a company to place its facilities underground, rather than overhead, consistent with the requirements imposed on other utility companies; (3) require a company to pay fees to recover an appropriate share of the increased street repair and paving costs that result from repeated excavation; (4) enforce local zoning regulations; and (5) require

a company to indemnify the City against any claims of injury arising from the company's excavation." Classic Telephone, Inc., 11 FCC Rcd 13082, 13103 (1996). It is **not** intended to allow local governments to reach beyond traditional rights-of-way matters in order to impose a redundant "third tier" of telecommunications regulation on top of traditional federal and state regulation. TCI Cablevision Of Oakland County, Inc., FCC 97-331, released September 19, 1997, at para. 105; Classic Telephone, Inc., FCC 97-335, at para. 34.

At minimum, the "competitively neutral" and "nondiscriminatory" elements of the Section 253(c) safe harbor require the local government to treat similarly situated entities in the same manner. Classic Telephone, Inc., 11 FCC Rcd at 13102.

Assuming arguendo that the dispute herein entails substantive right-of-way management issues rather than the City's refusal to process Chibardun's permit applications under its existing ordinances and practices, the City's treatment of Chibardun would still not qualify for the Section 253(c) safe harbor.

Rather, the City's treatment of Chibardun vis-a-vis GTE and its other permittees is the antithesis of "competitive neutrality" and "nondiscriminatory." For example:

1. Chibardun was the only one of twenty entities (including GTE) not to have its excavation permit applications granted by the City on a "same day" or "next day" basis during the first ten months of 1997.

2. Chibardun is being required by the City to pay a $10,000.00 fee before it can receive its excavation permits, compared to the $10.00 fees paid by GTE and the eighteen other entities receiving excavation permits during the first ten months of 1997.

3. Chibardun is the only entity applying for excavation permits during the first ten months of 1997 (including GTE) that has been asked or required by the City to reimburse it in an open-ended fashion for "any and all" costs it might incur for review, inspection or supervision of the permittee's activities.

4. Chibardun is the only excavation permit applicant during the first ten months of 1997 (including GTE) that has been required by the City to give any more that several days' or weeks' notice of its construction plans. Instead, Chibardun has been asked to submit one-year and three-year construction plans and schedules that will give GTE and other potential competitors invaluable advance notice of its Rice Lake construction and service plans.

5. Chibardun is the only excavation permit applicant during the first ten months of 1997 (including GTE) that has been asked by the City to identify its independent contractors before beginning construction. This advance information can give others the ability to tie up the contractors at the time they are needed by Chibardun.

6. Chibardun is the only excavation permit applicant during the first ten months of 1997 (including GTE) that has been asked or required by the City to provide virtually unlimited and uncontrollable indemnification of the City with respect to a negligent acts by the City's own employees and agents; (b) activities occurring long after the actual excavations have been completed (including operation and usage of facilities); and (c) injuries unrelated to excavation and construction (including electromagnetic exposure).

7. Chibardun is the only excavation permit applicant during the first ten months of 1997 (including GTE) that has been asked or required by the City to purchase insurance coverage far in excess of the coverage requirements set forth in the City's existing ordinance.

8. Chibardun is the only excavation permit applicant during the first ten months of 1997 (including GTE) that has been asked or required by the City to give the City free use of the surplus space on its poles, conduits and other structures.

9. Chibardun is the only excavation permit applicant during the first ten months of 1997 (including GTE) that has been asked or required by the City to furnish an irrevocable $50,000 letter of credit.

10. Chibardun is the only excavation permit applicant during the first ten months of 1997 (including GTE) that has been asked or required by the City to agree to relocate or remove its telecommunications facilities, at its own expense, from any right-of-way at the request of the City.

11. Finally, Chibardun is the only excavation permit applicant during the first ten months of 1997 (including GTE) that may be required to obtain the City's prior written approval before selling its facilities to another telecommunications provider.

It is hard to imagine what more the City could propose to tilt the Rice Lake telecommunications playing field further in GTE's favor, or to single out Chibardun for more onerous and expensive obligations that other excavation permittees. Its anticompetitive and discriminatory treatment of Chibardun precludes the City from claiming the protection of the Section 253(c) safe harbor.

CONCLUSION

Section 253(d) of the Communications Act orders the Commission to preempt the enforcement of any state or local statute, regulation or legal requirement that violates Section 253(a). Here, the City's refusal to grant excavation permits for the construction of Chibardun's proposed Rice Lake telecommunications system has already prohibited Chibardun's ability to provide telecommunications services in Rice Lake during 1997 and most of 1998, and threatens to extend this prohibition to lengthy future periods. Chibardun requests the Commission to preempt the City from continuing to refuse to process Chibardun's permit applications promptly in accordance with the City ordinances and procedures that

have been in effect from their May 19, 1997 filing date to the present, and from imposing or attempting to impose upon Chibardun onerous additional obligations and restrictions that exceed the requirements of its existing ordinances.

Respectfully submitted,
CHIBARDUN TELEPHONE COOPERATIVE, INC.
CTC TELCOM, INC.

By _____
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Dated: January 6, 1998

DECLARATION

I, Rick Vergin, hereby state the following:

1. I am the Executive Vice President and General Manager of Chibardun Telephone Cooperative, Inc. (Chibardun).

2. I have read and am familiar with the "Petition For Section 253 Preemption" which was filed with the Federal Communications Commission (FCC) on behalf of Chibardun and its subsidiary CTC Telcom, Inc. (CTC) on October 10, 1997. This document was prepared under my direction and supervision.

3. I have reviewed and am familiar with the "Reply Of Chibardun Telephone Cooperative, Inc. And CTC Telcom, Inc." which is being filed with the FCC in CC Docket No. 97-219 on behalf of Chibardun and CTC on January 6, 1998. This document was also prepared under my direction and supervision.

4. With the exception of those facts of which official notice can be taken, all factual statements and representations contained in the referenced "Petition For Section 253 Preemption" and "Reply Of Chibardun Telephone Cooperative, Inc. And CTC Telcom, Inc." are true and correct to the best of my knowledge, information and belief.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 6th day of January, 1998.

Ricky S. Vergin

Rick Vergin

CERTIFICATE OF SERVICE

I, Sharmon B. Truesdale, an employee in the law firm of Blooston, Mordkofsky, Jackson & Dickens, hereby certify that on this 6th day of January, 1998, I did send by first-class mail, a copy of the foregoing "Reply of Chibardun Telephone Cooperative, Inc. and CTC Telcom, Inc." to the following individuals:

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